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No. 01-339

IN THE

Supreme Court of the United States

TERRY L. STEWART, Director,
Arizona Department of Corrections,

Petitioner,

vs.

ROBERT DOUGLAS SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state makes an exception to its procedural default rule for a limited subset of constitutional claims, does the state court's determination that the claim does not fall within that category render the state rule "not independent of federal law" within the meaning of *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985)?

2. When a state court rules that a claim is "precluded" with an express reference to the pertinent state procedural default rule, does the state court's expression of doubt that the petitioner had a meritorious claim render the procedural basis of the ruling "unclear" so as to open the merits to federal habeas review?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Procedural default rules are necessary for efficient and timely resolution of an appellant's claims. The Ninth Circuit's refusal to respect these rules in the present case and cases from other states will needlessly delay enforcement of the death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

September, 2001

Respectfully submitted,

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Criminal Justice Legal Foundation

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IN THE

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TERRY L. STEWART, Director,
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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Over 20 years ago, Robert Smith and an accomplice kidnapped, raped, and murdered Sandy Owen in Arizona. *State* v. *Lambright*, 138 Ariz. 63, 67, 673 P. 2d 1, 4-5 (1983), overruled on other grounds in *Hedlund* v. *Sheldon*, 173 Ariz. 143, 146, 840 P. 2d 1008, 1011 (1992). His conviction and death sentence were reviewed by the state courts on direct appeal and in two collateral reviews. See *State* v. *Smith*, 138 Ariz. 79, 673 P. 2d 17 (1983); App. to Pet. for Cert. B-2.

Ten years after the initial state collateral review, petitioner filed a third state collateral petition. See App. to Pet. for Cert. D-2. The trial court dismissed the petition, holding:

> "The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e),

> 32.1(f), or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b)." App. to Pet. for Cert. C-2.

The court also noted that it found "outrageous" petitioner's suggestion that attorneys in the Pima County Public Defender's office had failed to bring a valid ineffective assistance claim merely to avoid embarrassing a colleague. *Ibid.* Two months later, the court denied rehearing, repeating a similar observation about this allegation. The trial court further noted that the allegation that the public defender's attorneys do not raise allegations of each other's ineffectiveness was factually incorrect, as that office had done so in other cases. See *id.*, at D-1, D-2.

The Arizona Supreme Court denied review without comment. *Id.*, at E-1.

The federal District Court also denied the federal habeas petition, finding the claim precluded by the procedural default in state court. The Court of Appeals for the Ninth Circuit reversed on this ground. The court noted that Arizona makes an exception to procedural default for claims "of sufficient constitutional magnitude." *Smith* v. *Stewart*, 241 F. 3d 1191, 1197 (2001), quoting *State* v. *Curtis*, 185 Ariz. 112, 912 P. 2d 1341, 1344 (Ariz. App. 1990) (internal quotation marks omitted). The Court of Appeals believed that applying this exception "necessarily included an evaluation of the strength of [Smith's] federal claim," and that under Ninth Circuit precedent this rendered the rule not independent of federal law. See *id.*, at 1196-1197. In the middle of its "independent rule" discussion, the Court of Appeals also found it "unclear . . . whether the [state] court invoked a procedural bar as the basis for its ruling." *Id.*, at 1196. The court stated, apparently as an alternative basis for its decision, that the state court's order in the present case "does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review." *Id.*, at 1197.

SUMMARY OF ARGUMENT

The present case should be heard on the merits as a companion case to *Lee* v. *Kemna*, presently before the Court. *Lee* involves the "adequate" portion of the "adequate and independent state grounds" problem, and this case involves the "independent" portion. Deciding both cases will provide a more complete resolution of related issues in a complex area.

The Court of Appeals' decision on the independence of the state rule is squarely contrary to the decision of this Court in *Sochor* v. *Florida*. The position of the Court of Appeals is largely the same as the position taken by the *Sochor* dissent and rejected by the Court. However, because that rejection came only in a responsive footnote, it warrants a more complete exposition.

The Court of Appeals' alternative holding, that the basis of the state court's order in this case is somehow not sufficiently clear, amounts to defiance of the on-point precedent established by this Court's decision in *Coleman* v. *Thompson*. There do not appear to be any valid grounds for distinguishing *Coleman*, and the Court of Appeals made no effort to do so.

ARGUMENT

I. This case is a worthwhile companion to *Lee* v. *Kemna*, presently before the Court.

On occasion, this Court has substantially clarified a troublesome area of the law by taking two or more cases in the same term to address different aspects of a problem. *United States* v. *Cronic*, 466 U. S. 648 (1984) and *Strickland* v. *Washington*, 466 U. S. 668 (1984) together straightened out many previously unresolved issues on ineffective assistance claims. Similarly *Murray* v. *Carrier*, 477 U. S. 478 (1986) and *Smith* v. *Murray*, 477 U. S. 527 (1986) together resolved multiple questions regarding defaults on appeal.

The issue of "adequate and independent state grounds" qualifies as a troublesome area. Scholars have long been critical of the lack of coherence of the cases in this area. See, *e.g.*, 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4023, p. 358 (2d ed. 1996) ("a confused picture").

Lee v. *Kemna*, No. 00-6933, presents a question regarding when a state procedural default rule is "adequate." *Lee* is an opportunity to replace the "varying rubrics" of inadequacy, as Hart and Wechsler call them, with a single, coherent standard. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 5-10 ("CJLF *Lee* Brief"). However, the picture would be more complete and the resolution more productive if the Court also addresses the question of when a state ground is "independent." Any such discussion in *Lee* would be *obiter dicta*, because that case does not involve an independence challenge to the state rule.

Independence and adequacy are separate concepts that ought to be analyzed separately, yet they are often confused. *McKenna* v. *McDaniel*, 65 F. 3d 1483, 1488-1489 (CA9 1995) held that Nevada's procedural default rule did not bar federal review because the state court had the discretion to waive it. Is that an "adequacy" problem, an "independence" problem, or simply erroneous? The Court of Appeals in the present case relied on *McKenna* for its holding that the state ground was not independent, *Smith* v. *Stewart*, 241 F. 3d 1191, 1196 (CA9 2001), but two days later a different panel of the same court held that this was an "adequacy" issue. See *Petrocelli* v. *Angelone*, 248 F. 3d 877, 886 (CA9 2001). *Amicus* believes the third option is correct. Discretion is a virtue, not a problem, and *McKenna* is simply wrongly decided. See Wright, Miller, & Cooper, *supra*, § 4026, at 385-386; CJLF *Lee* Brief 12-13. See also *Petrocelli*, *supra*, at 892 (Rymer, J., concurring) (noting the confused, conflicting state of Ninth Circuit law on this point).

Unfortunate and unnecessary language in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969) and other cases in the "adequacy" branch of this area of the law have created a perverse incentive toward rigidity. In *Lee*, *amicus* CJLF has invited the Court to prune this branch to accommodate the legitimate interests of both the states and the habeas petitioners. See CJLF *Lee* Brief 12-14. However, as the present case illustrates, expansive interpretation of the "independence" requirement threatens to create a similar problem. Rejecting a similar claim that "miscarriage of justice" review by the state court opened the door to plenary federal habeas, then-Judge Breyer wrote for the First Circuit:

> "If federal habeas courts were too ready to find that state 'miscarriage of justice' review constitutes 'waiver' of the state's procedural rules, the state either would have to convert what is often a speedy reviewing task into a full scale detailed examination of federal law *or it would have to abandon 'miscarriage of justice' review altogether. The latter alternative seems highly undesirable.* The former conflicts with the theory of *Wainwright* [v. *Sykes*, 433 U. S. 72 (1977)]." *McCown* v. *Callahan*, 726 F. 2d 1, 3-4 (1984) (emphasis added).

The present case, along with *Lee* v. *Kemna*, offers an opportunity to clear up the confusion, remove the perverse incentive, and establish a coherent rule which encourages states to provide relief from plain errors, fundamental errors, and miscarriages of justice, rather than discouraging such relief.

II. The decision in the present case conflicts with *Sochor* v. *Florida*.

The Court of Appeals held in the present case that "the state court's procedural ruling . . . was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude." *Smith* v. *Stewart*, 241 F. 3d 1191, 1196 (CA9 2001). From this premise, the Court of

Appeals concluded that "federal review is not barred." *Ibid.* This is essentially the same argument made by the dissent and rejected by the Court in *Sochor* v. *Florida*, 504 U. S. 527 (1992).

On direct appeal to the Florida Supreme Court, Sochor complained of error in the penalty phase jury instructions on the "heinousness factor." See *id.*, at 533. The state court rejected the claim as procedurally defaulted due to failure to object at trial and, in the alternative, without merit. See *id.*, at 534, quoting *Sochor* v. *State*, 580 So. 2d 595, 602-603, and n. 10 (Fla. 1991).

Ten years earlier, the state court had clarified the "fundamental error . . . exception to the contemporaneous objection rule as set out in Florida Rule of Criminal Procedure 3.390(d)." *Ray* v. *State*, 403 So. 2d 956, 960 (Fla. 1981). The court noted that "the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ibid.* The court specifically held that constitutional errors are not necessarily fundamental, and failure to object may waive any defects. *Id.*, at 961, citing *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

In *Sochor*, this Court granted certiorari to consider the merits of the "heinousness" jury instruction claim, among other issues. 504 U. S., at 532. However, on full consideration, the Court held that the procedural default ruling was an adequate and independent state ground and hence a jurisdictional bar. *Id.*, at 534, 535, n. *. The dissent argued that federal review was not barred because the Florida Supreme Court had the power to reach the merits through fundamental error review. See *id.*, at 548 (Stevens, J., dissenting), citing *Ray* v. *State*, *supra*. In particular, the dissent argued that the procedural default ruling required a review of the merits in order to determine whether the fundamental error exception applied. See *id.*, at 548, n. 7.

The Court of Appeals decision in the present case is based on a similar but even more cramped interpretation of the independence requirements. The Court of Appeals believed that *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985) negates the independence of the state rule any time that rule "depends on an *assessment* of a federal claim," *Smith*, 241 F. 3d, at 1196 (emphasis added), or even if the state "courts were required to *examine the nature* of a claim to determine whether the state's procedural default rule applied." *Id.*, at 1197 (emphasis added).

The *Sochor* Court rejected this narrow view of what constitutes an independent state ground.

> "Third, Justice Stevens suggests that, in holding Sochor's claim waived, the Supreme Court of Florida implied that the claim did not implicate 'fundamental error,' and that this in turn implied a rejection of Sochor's claim of 'error' presumably because all federal constitutional error (or at least the kind claimed by Sochor) would automatically be 'fundamental.' *Post*, at 548-549. To say that this is 'the most reasonable explanation,' *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), of the court's summary statement that Sochor's claim was 'not preserved for appeal,' see 580 So. 2d, at 602-603, is an Olympic stretch, see *Harris* v. *Reed*, 489 U. S. 255, 274-276 (1989) (Kennedy, J., dissenting). In any event, we know of no Florida authority supporting Justice Stevens's suggestion that all federal constitutional error (or even the kind claimed by Sochor) would be automatically 'fundamental.' Indeed, where, as here, valid aggravating factors would remain, instructional error involving another factor is not 'fundamental.' See *Occhicone* v. *State*, 570 So. 2d 902, 906 (Fla. 1990), cert. denied, 500 U. S. 938 (1991)." *Sochor*, 504 U. S., at 535, n. *.

A review for fundamental error, says *Sochor*, is equivalent to merits review only if all constitutional errors, or at least all of the kind in question, are automatically fundamental, as they were in *Ake* v. *Oklahoma*, *supra*, at 75. A state may legiti-

mately define a subset of constitutional claims as "fundamental" and thus undefaultable, and the definition of that subset is a matter of state law. State courts must, of course, follow this Court's precedents regarding which claims can only be knowingly waived, not inadvertently forfeited, as a matter of federal constitutional law. See *Freytag* v. *Commissioner*, 501 U. S. 868, 894-895, n. 2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases). A state court determination on that basis would be reviewed under 28 U. S. C. § 2254(d)(1). We are concerned here only with the state's voluntary decision to expand undefaultable status to claims outside the federal constitutional minimum. The state-law nature of the inquiry is confirmed by *Sochor*'s citation of a state case for the proposition that the error claimed is not "fundamental."

In a footnote responding to the passage quoted above, Justice Stevens protested, "The Court clearly misconstrues my point about fundamental error . . . ." *Sochor*, 504 U. S., at 548, n. 8. Even so, the passage reflects the Court's understanding of what the dissent would *need* to have argued to establish that Florida's "fundamental error" exception was a "merits" determination sufficient to open the door to federal review. The dissent asserted, correctly, that the Florida Supreme Court is "willing and able to consider whether fundamental error occurred." *Ibid.* The dissent's further assertion that "when it engages in fundamental error review" that court "reaches the merits of the claim," *id.*, at 549, n. 9, is what the Court rejected.

However clear this may be on careful reading, the *Sochor* Court's rejection of the dissent's broad interpretation of "merits" (and consequently narrow interpretation of independence) was not sufficient to preclude an even greater departure by the Ninth Circuit in the present case. Footnotes responding to dissents are not the best way to make precedent, as the copious briefing in *Mickens* v. *Taylor*, No. 00-9285, over one such footnote makes quite clear. This issue is important enough

to warrant a full explanation in a case where it is the central focus of briefing and argument.[1]

In short, "a United States court of appeals . . . has decided an important federal question in a way that conflicts with [a] relevant decision[ ] of this Court." Supreme Court Rule 10(c). The latter decision requires further elaboration, as its message has apparently not been conveyed.

III. The Court of Appeals' alternative holding that the state court did not invoke procedural default with sufficient clarity amounts to defiance of this Court's precedents.

Sandwiched in the middle of the Court of Appeals' analysis of the independence of the state ground is this most remarkable paragraph:

> "It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review." *Smith* v. *Stewart*, 241 F. 3d 1191, 1196-1197 (CA9 2001).

This paragraph appears to state an alternative basis for disregarding the procedural default in this case, *i.e.*, even if the

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1. The point was briefed and argued in *Sochor*, but not thoroughly, as it was not the main point. See Brief for Respondent in *Sochor* v. *Florida*, No. 91-5843, pp. 26-27, n. 24; Reply Brief for Petitioner in *Sochor* 4-5; Tr. of Oral Arg. in *Sochor* 18-23.

state rule is independent, it was not invoked with sufficient clarity in this case. This is the Court of Appeals' entire discussion of this issue. This paragraph is remarkable not only for its brevity, but also for the complete absence of any citation of authority for the stated "requirement." A likely reason for this absence is that the on-point Supreme Court precedent is squarely to the contrary.

Because the Arizona Supreme Court denied review without explanation, the pertinent order in this case is that of the trial court. See *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991). While the order is clear enough in its face, it becomes even more so when considered in the context of the rules it cites. Arizona Rule of Criminal Procedure 32.1 provides eight grounds for post-conviction relief. Paragraph (a) embraces all federal constitution claims, including the claim at issue in this case. Paragraphs (b) and (c) are for claims based on jurisdiction and sentence in excess of the legal maximum, respectively. These three paragraphs comprise one group for default purposes as discussed further below.

Paragraphs (e) and (h) provide relief in two "actual innocence" situations. Paragraph (e) requires newly discovered facts and diligence but has a relatively low burden of proof, while paragraph (h) lacks these prerequisites but has a higher burden of proof. Paragraph (d) is analogously for persons who ought not be in prison any longer, because they have "done their time." Paragraph (f) is for prisoners who have never had a review through no fault of their own, and paragraph (g) is for changes in the law. These paragraphs comprise the second group.

Rule 32.2 establishes the procedural default rule. Paragraph (a) precludes relief on defaulted claims for the first group. Paragraph (b) applies a more generous rule to the second group of claims, which are more likely to involve actual miscarriages of justice. The petitioner must give reasons for successive or untimely filing, however. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) ("cause-and-prejudice").

In the present case, the state trial court unambiguously found the claim precluded, expressly citing Rule 32.2(a). The court went on to hold that to the extent petitioner claimed the benefit of the more generous Rule 32.2(b), he had failed to meet the prerequisite of that rule. The paragraph preceding this holding states that the court did not regard the mere fact that he had been represented on his prior petition by an attorney in the same office as the one who had represented him at trial to be a sufficient showing. App. to Pet. for Cert. C-2.

The term "clearly and expressly," in the context of independent state grounds, comes from *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), where this Court stated, "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." This statement is not the holding of the case but rather a qualification to the holding, and it must be read in that context. The holding is, "when, as in this case, a state court decision *fairly appears to rest primarily on federal law*, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040-1041 (emphasis added). The same rule applies to habeas cases. See *Harris* v. *Reed*, 489 U. S. 255, 263 (1989).

For two years after *Harris*, there was a plausible argument that its truncated statement of the *Long* rule, see *ibid.*, had imposed a "clearly and expressly" requirement on *all* procedural default holdings. That was precisely the habeas petitioner's contention in *Coleman* v. *Thompson*, 501 U. S. 722, 735-736 (1991). The Court emphatically rejected the argument, noting "Coleman has read the rule out of context." *Id.*, at 736. The *Long* presumption, and hence the "clearly and expressly" requirement, "appl[ies] only on those cases in which ' "it fairly appears that the state court rested its decision primarily on

federal law." ' *Harris*, *supra*, at 261, quoting *Long*, 463 U. S., at 1040." *Ibid.*

The Court of Appeals in the present case simply plowed ahead and applied the "clearly and expressly" requirement as if *Coleman* had been decided the other way. We know the Court of Appeals was aware of *Coleman*, having cited it for a related point only four paragraphs earlier. See *Smith*, 241 F. 3d, at 1195. Such a flagrant disregard for controlling Supreme Court precedent approaches judicial lawlessness.

The Court of Appeals' conclusion that there is ambiguity in the procedural basis of the state ruling shows a similar disregard for controlling precedent. Again, *Coleman* is the leading case. In *Coleman*, the requisite clarity was found in the state court's order that it was granting the state's motion to dismiss, a motion based on procedural grounds. See 501 U. S., at 740. In the present case, we have the much more explicit statement that the claim is precluded, with citation to the procedural default rule. In *Coleman*, there was some ambiguity added by the state court's statement that it had considered all the papers, which included briefing on the merits, "but we simply cannot read [this statement] as overriding the court's explicit grant of a dismissal motion based solely on procedural grounds." *Id.*, at 744. In the present case, the only basis for any claim of ambiguity is in the state court's finding that the allegation the public defender withheld a valid claim was not credible. See App. to Pet. for Cert. C-2.

No rational person could compare the order in the present case with the one in *Coleman* and find this one to be the less clear of the two. To the extent they differ, the differences point the other way. The two cases are so remarkably similar, and *Coleman* is such an important case in this area, that even a minimal respect for precedent would seem to require an explanation of why the Court of Appeals thinks *Coleman* is distinguishable. Instead, we have a cavalier, citation-free single paragraph brushing aside the state court's explicit, chapter-and-verse citation of the state procedural default rule.

The Court of Appeals' holding on the supposed unclarity of the state court order's basis is also squarely contrary to *Sochor* v. *Florida*, 504 U. S. 527 (1992). In *Sochor*, a simple "statement that 'the claim was not preserved for appeal' " was clear enough. *Id.*, at 535, n. *. The fact that the state court also said the claim was without merit did not render it any less clear. See *ibid.* In the present case, the state court's explicit citation of the procedural default rule makes the basis more clear than it was in *Sochor*.

The general rule in the American judicial system is that state courts are competent to decide federal questions, subject to review only by this Court, not the lower federal courts. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 898-903 (1998). Habeas corpus is a unique exception for constitutional claims by prisoners in state custody. The purposes of this extraordinary review by a coordinate court is to force the state courts "to toe the constitutional mark." See *Mackey* v. *United States*, 401 U. S. 667, 687 (1971) (Harlan, J., concurring in the judgment).

This Court has long recognized the problems in habeas review, both in the delicacy of relations between state and federal courts, see *Ex parte Royall*, 117 U. S. 241, 250-253 (1886), and in the costs to society of lack of finality. See *Coleman*, 501 U. S., at 748. Congress, too, has shown its concern over the rampant abuse of the habeas power and curtailed it in the Antiterrorism and Effective Death Penalty Act of 1996, §§ 101-107, 110 Stat. 1214, 1217-1226. See also *Calderon* v. *Thompson*, 523 U. S. 538, 554-557 (1998).

The lower federal courts, in exercising their authority in this sensitive area, must themselves take great care to "toe the mark." That is, this extraordinary jurisdiction must be exercised with scrupulous adherence to its limits. Federal courts must obey the Court's precedents in all cases, of course, but especially so when they exercise a function normally reserved to this Court alone, reviewing cases already decided by the highest courts of the states.

Regrettably, in capital cases in the Ninth Circuit the people of the states have suffered a recurring pattern of abuse of judicial authority that has required unusual orders and prompted unusually harsh rebukes from this Court. See, *e.g.*, *Vasquez* v. *Harris*, 503 U. S. 1000 (1992); *Calderon* v. *Thompson*, 523 U. S., at 552. We now see the systematic nullification of this Court's jurisprudence on procedural default, as state rules are declared "inadequate" or not "independent" on the flimsiest of excuses,[2] and perfectly clear default rulings are declared unclear by conjuring up imaginary ambiguities. This is not the rule of law. This is not why we have federal courts. This is a pure example of exercising will instead of judgment. Cf. The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (Hamilton).

This decision goes far beyond the kinds of errors and splits of authority that would normally call for a writ of certiorari. Cf. Supreme Court Rule 10. This is a matter of the integrity of the federal judiciary. The actions of the Ninth Circuit are so far beyond the pale that exercise of this Court's certiorari jurisdiction is imperative.

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2. The present case continues the pattern of *McKenna* v. *McDaniel*, 65 F. 3d 1483 (CA9 1985), cert. denied, 517 U. S. 1150 (1996), discussed *supra*, at 4, *Fields* v. *Calderon*, 125 F. 3d 757, 763 (CA9 1997), cert. denied, 523 U. S. 1132 (1998), and *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000), cert. denied, 531 U. S. 918 (2000) among other cases.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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